TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 46

REX TRAILER COMPANY, INC., PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 11, 1955

CERTIORARI GRANTED MAY 23, 1955

In the

United States Court of Appeals

For the Seventh Circuit

No. 11139

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

REX TRAILER COMPANY, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

INDEX.

Placita	1
Complaint, filed Aug. 9, 1950	1
Plaintiff's Motion for Summary Judgment, filed Oct. 1, 1952	3
Defendant's Motion for Summary Judgment, filed Oct. 9, 1952	4
Stipulation re Amended Answer, etc., filed Mar. 18, 1953	5
Amended Answer, filed Mar. 18, 1953	6
Ex. A—Indictment in Oklahoma Case	8
Ex. B—Judgment in Oklahoma Case	11
Judgment, entered Feb. 1, 1954	12
Notice of Appeal, filed Mar. 2, 1954	13
Statement of Points	14
Designation of Record	14
Clerk's Certificate	15
Proceedings in U.S.C.A. for the Seventh Circuit	17
Opinion, Duffy, J.	17
Judgment	23
Clerk's certificate	(omitted in printing)
Order allowing certiorari	27

1 Pleas of the United States District Court for the Southern District of Indiana, at the United States Court House in the City of Indianapolis, in said District, before the Honorable William E. Steckler, Judge of said District Court.

United States of America
vs.
Rex Trailer Company, Inc. } No. 2357 Civil.

Be It Remembered that heretofore, to-wit: at the May Term of said Court, on the 9th day of August, 1950, before the Honorable William E. Steckler, Judge of said Court, the following proceedings in the above case were had, to wit:

Comes now the Plaintiff, by its attorney, and files Complaint in the above-entitled cause, which complaint reads as follows:

2 IN THE UNITED STATES DISTRICT COURT
For the Southern District of Indiana,
Indianapolis Division.

United States of America
vs.
Rex Trailer Company, Inc.,
1201 East Georgia Street,
Connersville, Indiana. } No. 2357 Civil.

1

COMPLAINT FOR CIVIL DAMAGES.

(Filed Aug. 9, 1950. Albert C. Sogemeier, Clerk.)

Comes now the plaintiff United States of America and for cause of action against the defendant Rex Trailer Company, Inc., alleges and says:

(a) That jurisdiction is conferred on this court by the provisions of Title 50 United States Code Annotated, Sections 1635(b), (c) and (d).

(b) That the defendant is a corporation duly organized under the statutes of the State of Indiana, with its principal place of business located at 1201 East Georgia Street, Connersville, Indiana.

Count I.

That the defendant during the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the state of Oklahoma, did cause Lester Daniels to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining 1 Ross Carrier Company Straddle Truck, model 90-7056, serial 1940 USA 563821.

Count II.

That the defendant during the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the state of Oklahoma, did cause Ted J. Thompson to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining 1 Ross Carrier Co. Straddle Truck, model 90-7056, serial No. 1913, USA 563807.

3 Count III.

That the defendant during the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the state of Oklahoma, did cause Frank Scott to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining one Ross Carrier Straddle Truck, model 90-7056, serial 1935, USA 563816.

Count IV.

That the defendant during the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the state of Oklahoma, did cause James H. Wolverton to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining a ¼ ton Willys truck, U. S. No. 2032993, motor number 10709, serial No. 101622.

Count V.

That the defendant during the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the state of Oklahoma, did cause Will H. Nealey to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining a 1942 Dodge truck, engine T-214-18817.

Wherefore, in accordance with Title 50 United States Code Annotated, Sec. 1635(b) (1), plaintiff prays for judgment against defendant in the sum of $2000.00 on Count I, in the sum of $2000.00 on Count II, in the sum of $2000.00 on Count III, in the sum of $2000.00 on Count IV, and in the sum of $2000.00 on Count V, and in the total sum of $10,000.00 for all counts, together with plaintiff's costs herein and all other just and proper relief.

Matthew E. Welsh,
United States Attorney.

* * * * *

13 And afterwards, to-wit, at the May Term of said Court on the 1st day of October, 1952, before the Honorable William E. Steckler, Judge of said Court, the following further proceedings were had herein, to-wit:

Comes now the plaintiff, by its attorney, and files Motion for Summary Judgment, which reads as follows:

14 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2357) * *

MOTION FOR SUMMARY JUDGMENT.

(Filed Oct. 1, 1952. Maurice W. Graston, Clerk.)

Plaintiff moves the court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in the complaint, on the ground that the affirmative defenses set forth in de-

fendant's answer are insufficient as a matter of law and that the brief in support of defendant's answer of former jeopardy admits there is no genuine issue as to any material fact, the plaintiff is entitled to judgment as a matter of law.

2. This motion is based upon:

(a) The points and authorities set forth in the attached brief in support of plaintiff's motion for summary judgment.

(b) Brief filed by defendant in support of defendant's answer of former jeopardy.

Marshall E. Hanley,
U. S. Attorney.

Copy mailed to Counsel 10/1/52.
M. E. H.

15 And afterwards, to-wit: at the May Term of said Court on the 9th day of October, 1952, before the Honorable William E. Steckler, Judge of said Court, the following further proceedings were had herein, to-wit:

Comes now the defendant, by its attorneys, and files Motion for Summary Judgment, which reads as follows:

16 IN THE DISTRICT COURT OF THE UNITED STATES.

* * * (Caption—2357) * * *

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

(Filed Oct. 9, 1952. Maurice W. Graston, Clerk.)

The defendant Rex Trailer Company, Inc. moves the Court for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure that the plaintiff take nothing by its complaint on the ground that plaintiff's motion for summary judgment and supporting brief filed October 1, 1952, admits the allegations of fact contained in defendant's affirmative answer among which is the following allegation:

"That the action is for a statutory penalty and does not seek a remedy for the collection of any obligation or indebtedness owing the United States of America."

The motion is based upon the authorities cited and quoted from in defendant's attached brief, in support of this motion and in opposition to plaintiff's motion for summary judgment.

Rex Trailer Company, Inc.,
By Bernard Stroyman,
Michael L. Fansler.

Fansler, Fauvre, Young & Chambers,
Of Counsel.

The undersigned acknowledges service and receipt of copy of the foregoing Motion this 9th day of October, 1952.

Marshall E. Hanley,
U. S. Atty.

17 And afterwards, to-wit: at the November Term of said Court on the 18th day of March, 1953, before the Honorable William E. Steckler, Judge of said Court, the following further proceedings were had herein, to-wit:

Come now the parties and file Stipulation, which reads as follows:

18 In the District Court of the United States.
(Caption—2357)

STIPULATION.

(Filed Mar. 18, 1953. Maurice W. Graston, Clerk.)

The parties hereto stipulate that the defendant may file an amended answer, and that the issues in the above entitled and numbered cause, made up by the Complaint and said Amended Answer thereto, be submitted to the Court for judgment on the pleadings and the motions for summary judgment by plaintiff and defendant, filed October 1 and October 9, 1952, respectively.

Marshall E. Hanley,
United States Attorney.
Fansler, Fauvre, Young & Chambers,
By Michael L. Fansler,
Bernard Stroyman,
Attorneys for Defendant.

March 17, 1953.

19 Comes now the defendant and files Amended Answer, which reads as follows:

20 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2357)

AMENDED ANSWER.

(Filed Mar. 18, 1953. Maurice W. Graston, Clerk.)

The defendant Rex Trailer Company, Inc. for answer to the plaintiff's complaint herein alleges and says:

1. That plaintiff's action herein although denominated "Complaint for Civil Damages" is an action for a statutory penalty and that the plaintiff by said complaint does not seek a remedy for the collection of any obligation or indebtedness owing to or the recoupment or recovery of damage suffered by the plaintiff.

2. That heretofore, to-wit: at the January Term 1949 in the District Court of the United States, for the Western District of Oklahoma, the grand jurors of the United States of America within and for said District returned an indictment in five counts against this defendant and Isadore Levy and one Sydney O. Sydney then in the employ of this defendant. Said indictment was in five counts and charged each of said defendants with the identical offenses charged in the five counts of the complaint herein. A copy of said indictment is attached hereto and made a part hereof and marked Exhibit "A".

3. That thereafter on the 28th day of April, 1949, this defendant appeared to said indictment and entered a
21 plea of nolo contendere to all of the counts of said indictment and it was there stated to the Court by the defendant's attorney that it had been agreed with the office of the Attorney General that "all matters affecting these defendants may be disposed of in this case", which statement was acquiesced in by the District Attorney.

4. That pursuant to said plea and agreement and on the 23rd day of June, 1949, an order and judgment was entered upon the five counts of said indictment finding this defendant guilty upon each of said counts and finding this defendant upon each count, the fine aggregating $25,000.00, a copy of which order, judgment and sentence is hereto attached and made a part hereof, marked Exhibit "B".

5. That this defendant has paid the fine adjudged against it by the above mentioned order and judgment.

6. That the trucks referred to in said indictment were advertised and offered for sale by the War Assets Administration at a fixed price and were sold first come first served to qualified purchasers; that in said advertised offer for sale, it was provided that certain agencies and persons would have priority rights in the purchase of the trucks offered. That those granted priority were Housing Expediter and CPA Certificate Holders, Federal Agencies, Certified Veterans World War II, R. F. C. for Small Business, States and Political Subdivisions and Certified Non-Profit Institutions, who were to have priority in purchasing rights at the advertised price in the order in which they are listed. The advertisement and order provided that, if all available trucks were not purchased by those having priority, certain manufacturers and dealers of construction mining and farm machinery were to have non-priority rights to purchase the trucks advertised and available at the advertised price.

22 7. That this defendant was at that time a dealer engaged in the business of buying, selling, repairing, and reconditioning construction, farm machinery and mining machinery and attachments, and maintained a place of business for the display, sale and repairing and reconditioning of such machinery and attachments, and said business was not maintained for the primary purpose of purchasing such equipment for scrap or in order to salvage useable parts for resale. That as such dealer, this defendant, under said advertisement and offer for sale, had the non-priority right to purchase any of the trucks offered at such sale, if any such trucks remained after the purchases by those having priority.

8. That the "false statements of a material fact in writing to the War Assets Administration", which this defendant and its employees were charged in said indictment with having brought about, were statements qualifying the persons named in each of the counts of the indictment for a priority right to purchase the trucks referred to in the indictment.

9. That all of the trucks advertised were sold at said sale to those having or claiming priorities, but that, if all of said trucks had not been sold, this defendant would have had the right under the terms of said sale to purchase said trucks at the advertised price as a non-priority purchaser.

10. That by reason of the facts above set forth, th plaintiff was not damaged and did not suffer any loss be cause of the sale of said trucks and received the full ad vertised offering price for the same, and had said truck not been sold to the persons who purchased them, the would have been sold at the same price to other priority o non-priority purchasers.

11. That the complaint herein, by reason of th
23 facts above alleged, seeks to recover a further penalt in addition to the fine and penalty adjudged agains and paid by this defendant, and therefore places this de fendant in jeopardy a second time for the same offens contrary to the provisions of the Fifth Amendment to th Constitution of the United States of America.

Wherefore, the defendant prays judgment and that th plaintiff take nothing and that defendant recover its cost

Bernard Stroyman,
Fansler, Fauvre, Young & Chamber
By Michael L. Fansler,
Attorneys for Defendan

24 Exhibit "A".

IN THE DISTRICT COURT OF THE UNITED STATES

For the Western District of Oklahoma.

United States of America, *Plaintiff.* vs. Rex Trailer Company; Isadore Levy; Sydney Owen Sydney, *Defendant.*	No. 15820.

INDICTMENT.

Violation: Section 80, Title 18, U. S. C. A.

At the January, 1949, Term of the District Court, of th United States for the Western District of Oklahoma, be gun and held at city of Oklahoma City in said district, o the 3d day of January, in the year of our Lord one thou sand nine hundred forty-nine the Grand Jurors of th

United States of America, within and for said District, having been duly summoned, impaneled, sworn, and charged to inquire into and true presentment make of all public offenses against the laws of the United States of America, committed within said District in said State of Oklahoma, upon their oath aforesaid, in the name and by the authority of the United States of America, find and present:

25 Cause to Be Made a False Statement to a Government Agency.

Count One.

During the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the State of Oklahoma, Rex Trailer Company, Isadore Levy and Sydney Owen Sydney did cause Lester Daniels to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining a Ross Carrier Company Straddle Truck, Model 90-7056, Serial 1940, USA 563821.

Count Two.

The Grand Jury further alleges:

During the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the State of Oklahoma, Rex Trailer Company, Isadore Levy and Sydney Owen Sydney did cause Ted J. Thompson to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining 1 Ross Carrier Co. Straddle truck, model 90-7056, Serial No. 1913, U. S. A. 563807.

Count Three.

The Grand Jury further alleges:

During the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the State of Oklahoma, Rex Trailer Company, Isadore Levy and Syd-

ney Owen Sydney did cause Frank Scott to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining one Ross Carrier Straddle Truck, model 90-7056, Serial 1935, U. S. A. 563816.

26 Count Four.

The Grand Jury further alleges:

During the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the State of Oklahoma, Rex Trailer Company, Isadore Levy, and Sydney Owen Sydney did cause James H. Wolverton to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining a ½-ton Willys truck, U. S. No. 2032993, motor number 10709, Serial Number No. 101622.

Count Five.

The Grand Jury further alleges:

During the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the State of Oklahoma, Rex Trailer, Isadore Levy and Sydney Owen Sydney did cause Will H. Nealey to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining a 1942 Dodge truck, Engine T-214-18817.

(Sgd.) Haskell B. Pugh,
Assistant United States Attorney.

[fol. 27] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 715

REX TRAILER COMPANY, INC., Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed May 23, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

27 Exhibit "B".

IN THE UNITED STATES DISTRICT COURT

For the Western District of Oklahoma.

The United States,
Plaintiff,
vs.
Rex Trailer Company,
Defendant.

No. 15,820
Criminal

ORDER OF JUDGMENT AND SENTENCE.

On this 23rd day of June, 1949, the defendant, Rex Trailer Company, appears by Isadore Levy and Sydney Owen Sydney, and by Charles E. Dierker, Esq., and Bernard Stroman, Esq., for sentence on finding of guilty to plea of nolo contendere heretofore entered to each of the first, second, third, fourth and fifth counts of the indictment herein. It is by the Court

Considered, Ordered and Adjudged that the defendant, Rex Trailer Company, for the offense by it committed, pay a fine unto the United States in the sum of Ten Thousand Dollars ($10,000.00), on each of the first and second counts of the indictment; pay a fine unto the United States in the sum of Five Thousand Dollars ($5,000.00) on the third count of the indictment, and execution is hereby awarded.

It is further ordered that execution herein be stayed for ten (10) days from this date, and imposition of judgment and sentence on the fourth and fifth counts of the indictment continued pending payment of fines imposed on each of the first, second and third counts of the indictment.

Sgd. Stephen S. Chandler, Jr.
District Judge.

28 IN THE UNITED STATES DISTRICT COURT

For the Western District of Oklahoma.

The United States, *Plaintiff*, vs. Rex Trailer Company, *Defendant*.	No. 15,820 Criminal.

ORDER OF JUDGMENT AND SENTENCE.

On this 12th day of July, 1949, the defendant Rex Trailer Company appears by Charles E. Dierker, Esq., its attorney, for sentence on finding of guilt to plea of nolo contendere heretofore entered to each of the fourth and fifth counts of the indictment herein. It is by the Court

Considered, Ordered And Adjudged that the defendant, Rex Trailer Company for the offenses by it committed as charged in the fourth and fifth counts of the indictment herein, pay a fine unto the United States in the sum of One Dollars ($1.00) on each of the fourth and fifth counts of the indictment, for all of which execution is awarded.

Sgd. Stephen S. Chandler, Jr.
District Judge.

33 And afterwards, to-wit: at the October Term of said Court on the 1st day of February, 1954, before the Honorable William E. Steckler, Judge of said Court, the following further proceedings were had herein, to wit:

The plaintiff's Motion for Summary Judgment and the defendant's Motion for Summary Judgment having a second time come before the Court for consideration, and the Court having further considered said motions and the briefs of the parties together with their oral arguments, and being fully advised in the premises now again overrules defendant's Motion for Summary Judgment and again sustains plaintiff's Motion for Summary Judgment for the reason that there is no genuine issue as to any material fact and that the plaintiff is entitled to a judgment as a matter of law.

It is, therefore, Ordered, Adjudged and Decreed that the motion of the plaintiff for Summary Judgment be and the same is hereby sustained, and the United States of America have and recover judgment of and from the Rex Trailer Company, Inc. in the amount of $10,000.00, together with the costs of this action.

(Signed) William E. Steckler,
United States District Judge.

41 And afterwards, to wit: at the October Term of said Court on the 2d day of March, 1954, before the Honorable William E. Steckler, Judge of said Court, the following further proceedings were had herein, to wit:

Comes now the defendant by its attorneys, and files Notice of Appeal, which reads as follows:

42 UNITED STATES DISTRICT COURT

Southern District of Indiana,

Indianapolis Division.

United States of America,
vs.
Rex Trailer Company, Inc. } No. 2357 Civil

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Notice is hereby given that the defendant, Rex Trailer Company, Inc. in the above entitled cause hereby appeals to the United States Court of Appeals for the Seventh Circuit from the judgment entered in this action on February 1, 1954.

Rex Trailer Company, Inc.
Bernard Stroyman,
Michael L. Fansler,
Irving M. Fauvre,
Michael D. Fansler,
David L. Chambers, Jr.,
By Michael L. Fansler,
Attorneys for Defendant.

43 Comes now the defendant, by its attorney and files Points on Appeal, which read as follows:

44 UNITED STATES DISTRICT COURT.
(Caption—2357)

DEFENDANT'S POINTS ON APPEAL.

(Filed Mar. 2, 1954, Maurice W. Graston, Clerk.)

The defendant, Rex Trailer Company, Inc., intends to rely on the following points in the appeal of the above entitled cause:

1. The judgment of the court sustaining plaintiff's motion for a summary judgment and denying defendant's motion for a summary judgment is contrary to law.

Rex Trailer Company, Inc.
Bernard Stroyman,
Michael L. Fansler,
Irving M. Fauvre,
Michael D. Fansler,
David L. Chambers, Jr.,
By Michael L. Fansler,
Attorneys for Defendant.

45 Comes now the defendant, by its attorneys, and files Designation of Contents of Record on Appeal, which reads as follows:

46 UNITED STATES DISTRICT COURT.
(Caption—2357)

DEFENDANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

(Filed Mar. 2, 1954, Maurice W. Graston, Clerk.)

The defendant hereby designates the following portions of the record and proceedings on appeal:

1. Plaintiff's complaint filed August 9, 1950.
2. Plaintiff's motion for summary judgment filed October 1, 1952.
3. Defendant's amended answer filed March 18, 1953.

4. Stipulation dated March 18, 1953.
5. Judgment entered August 26, 1953.
6. Defendant's motion to set aside judgment filed August 28, 1953.
7. Order setting aside judgment entered September 2, 1953.
8. Final judgment entered February 1, 1954.
9. Defendant's notice of appeal.
10. Defendant's supersedeas bond and entry showing filing and approval thereof and stay of execution.
11. Defendant's designation of contents of record on appeal.
12. Defendant's statement of points.

Rex Trailer Company, Inc.,
Bernard Stroyman,
Michael L. Fansler,
Irving M. Fauvre,
David L. Chambers, Jr.,
Michael D. Fansler,
By Michael L. Fansler,
Attorneys for Defendant.

49 UNITED STATES DISTRICT COURT.
(Caption—2357)

CLERK'S CERTIFICATE.

I, Maurice W. Graston, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the above and foregoing is a true and full transcript of the record and proceedings in the above-entitled cause, pursuant to the Defendant's Designation of Contents of Record on Appeal filed March 2, 1954, and the Plaintiff's Designation of Additional Portions of the Record to be included on Appeal filed March 11, 1954, now remaining among the records of said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, Indiana, this 19th day of March, 1954.

Maurice W. Graston,
Clerk, United States District Court,
Southern District of Indiana.

[fol. 17] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT—OCTOBER TERM, 1954, JANUARY SESSION, 1955.

No. 11139.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

REX TRAILER COMPANY, INC., Defendant-Appellant

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

OPINION—January 18, 1955.

Before Duffy, Chief Judge, Major and Finnegan, Circuit Judges

DUFFY, Chief Judge:

This action was brought by the United States government pursuant to § 26(b) of the Surplus Property Act.[1] The complaint contained five counts. Count 1 was as follows:

> "That the defendant during the week of June 17, 1947, a more exact date being at this time unknown, at Tinker Field, near Oklahoma City, in the Western District of the state of Oklahoma, did cause Lester Daniels to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining 1 Ross Carrier Company Straddle Truck, model 90-7056, serial 1940 USA 563821."

Counts 2 to 5 inclusive are identical with Count 1 except as to the name of the person making the false statement and the description of the motor vehicle involved. Judg-
[fol. 18] ment was asked in the sum of $2,000 on each count.

---

[1] § 26(b)(1) of the Surplus Property Act of 1944, 50 U.S.C.A. appendix, § 1635(b), repealed and re-enacted as § 209(b) of the Federal Property and Administrative Services Act of 1949, 40 U.S.C.A. § 489(b).

Both plaintiff and defendant moved for summary judgment and plaintiff's motion was granted. The District Court entered judgment in favor of plaintiff for the sum of $10,000.

Sec. 26(b) of the Surplus Property Act of 1944 grants to the United States civil remedies against "Every person who shall use or engage in * * * any fraudulent trick, scheme, or device, for the purpose of securing or obtaining * * * for any person any payment, property, or other benefits from the United States or any government agency in connection with the disposition of property under this Act * * * (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or * * *"

As a defense the defendant alleged that it had pleaded *nolo contendere* in a criminal action based upon the same events; that in said criminal action the indictment contained five counts that corresponded exactly with the five counts in the instant action; that on June 23, 1949, as a result of its plea, a fine was imposed and defendant has paid an aggregate sum of $25,000; that plaintiff was not damaged and did not suffer any loss as it received the full offering price for the vehicles; that although the complaint was denominated "complaint for civil damages" this action is, in fact, one to recover penalties, and, therefore, is barred by the prohibition against double jeopardy contained in the Fifth Amendment to the United States Constitution.

Defendant was a dealer engaged in buying, selling and repairing farm machinery and mining machinery. Under the advertisement and offer of sale, it had a non-priority right to purchase the motor vehicles thus offered for sale if any such remained after those having priority had been given an opportunity to purchase. The "false statements" charged were the statements qualifying the persons named in each of the counts for a priority right to purchase. At the sales in question all vehicles advertised were sold to those having or claiming priorities.

The Fifth Amendment guarantees that no person shall "* * * be subject for the same offense to be twice put in jeopardy of life or limb." However, "Congress may im-

pose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause pro-[fol. 19] hibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." *Helvering* v. *Mitchell*, 303 U. S. 391, 399.

As stated in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 548, "The application of the double jeopardy clause to particular cases has not been an easy task for the courts." In the same case, the court, page 549, quotes from *Helvering* v. *Mitchell, supra*, as follows: "The question for decision is thus whether * * * (the statute in question) * * * imposes a criminal sanction. That question is one of statutory construction." In other words, we must here endeavor to ascertain the legislative intent.

The section in question was enacted shortly after the decision of the Supreme Court in *Marcus* v. *Hess, supra*. We may assume that the framers of § 26(b) were aware of that decision when they formulated § 26(b). It should be noted that the statute specifically describes subsection (b) as providing "civil remedies". The section contains subsections 1, 2 and 3. The latter two provide only for multiple damages and are, without question, compensatory in nature. It is very doubtful that Congress intended to have the first of the three subsections a penal section. In fact, the pertinent committee report (S. Rep. No. 1057, 78th Cong., 2d Sess. p. 14) states that the United States has "* * * the option of selecting among three different measures of damages, * * *" It is a reasonable construction that Congress intended all three subparagraphs of § 26(b) to be *in pari materia*. It is also of significance that § 26(d) expressly provides that the "civil remedies provided in (§ 26) shall be in addition to all other criminal penalties and civil remedies provided by law."

If § 26(b)(1) is of a penal nature the imposition of such penalty in addition to the sanctions provided by the criminal code, contravenes the prohibition against double jeopardy. Of course, statutes are to be construed, if possible, to avoid constitutional issues. *United States* v. *Congress of Industrial Organizations, et al.*, 335 U. S. 106, 120-121; *Guessefeldt* v. *McGrath, etc.*, 342 U. S. 309, 319.

Both sides discuss and the Government strongly relies upon *Marcus* v. *Hess, supra*. There the defendant had pleaded *nolo* to an indictment to defraud the United States, and had paid the fine which was imposed. Thereafter, an action was brought under the False Claims Act (31 U.S.C. [fol. 20] 231) which contains language quite similar to § 26(b). It provides that a person who commits certain frauds upon the United States "* * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained * * * together with the costs of the suit; * * *" And, as here, the defendant sought to defend the civil action on the ground that the statute prescribed a penalty and that the double jeopardy provision of the Fifth Amendment barred the proceeding under the False Claims Act.

The court held that the provision that the Government was to recover $2,000 and double damages for each fraud in violation of the statutes was remedial and not penal. The court (317 U.S. 549) said: "It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction * * * We cannot say that the remedy now before us requiring payment of a lump sum (of $2000) and double damages will do more than afford the government complete indemnity for the injuries done it."

This construction by the Supreme Court of the statutory provision for the payment of $2000 plus double damages is, indeed, persuasive as to the construction to be given to § 26(b)(1). Both provisions relate to frauds upon the Government. The False Claims Act pertains to frauds in connection with claims submitted to the government. Sec. 26(a)(1) deals with frauds in procuring property from the government. Indeed, the language "forfeit and pay" in the False Claims Act is stronger than the language "pay" in § 26(a)(1). As the Supreme Court held that "forfeit and pay" did not convert the $2000 payment plus double damages provision in that Act to a penalty it seems to follow that it would also construe the milder provision of "pay" in § 26(a)(1) in the same manner.

We think the decision of *Helvering* v. *Mitchell, supra*,

also indicates that § 26(a)(1) does not provide a penalty. In that case there had been a prosecution of defendant for fraud under the tax laws. Defendant sought to defend against the government's claim for an additional 50% over the tax owed, on the ground that its recovery was barred by the prohibition against double jeopardy. The court, pointing out that the basic question was one of statutory construction, held that Congress intended the 50% provision as a civil and not a criminal sanction.

[fol. 21] The Court of Appeals for the Fifth Circuit, in *United States* v. *Weaver, et al.*, 207 F. 2d 796, held that § 26(a)(1) was compensatory and not penal. That case involved the statute of limitations but whether the section was penal or compensatory was of prime importance in making the decision. The court said, pages 797-798: "This is not a criminal prosecution; it is not a civil action for a penalty; it is a civil action to recover an award of damages of a compensatory nature, payable to the United States for injuries to its property rights."[2]

In *Marcus* v. *Hess, supra*, page 548, the court pointed out the difference between civil remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice, and that only the latter subject the defendant to "jeopardy" within the constitutional meaning. The defendant argues that the government here has not suffered a financial loss and hence the *Marcus* case cannot be considered as authority against its contentions. Defendant argues that the decision in the court below was on a motion for summary judgment and, therefore, we must consider as true, defendant's allegation that the United States suffered no actual financial loss because the priority pur-

---

[2] The Court of Appeals for the Sixth Circuit in *United States* v. *Witherspoon*, 211 F. 2d 858, held that § 26(a)(1) was penal. It is interesting to note that the opinion made no mention of *Helvering* v. *Mitchell, supra*, or *Marcus* v. *Hess, supra*, nor why these decisions which we regard as persuasive, were regarded by that court as inapplicable. In our judgment the *Witherspoon* case was incorrectly decided.

chasers actually paid the offering price. Defendant insists that if this action involves more than making the United States whole for actual financial loss, it involves punitive elements.

We may concede that if veterans and all others having priority did not purchase the motor vehicles advertised, that defendant or other persons having no priority might have purchased same. However, such assumption ignores realities. The shortage of civilian motor vehicles in 1946-7 was very acute and was well known. Motor vehicles made up a large portion of the surplus property set aside for the exclusive use of veterans. The objectives of the Surplus Property Act in 1944 were to facilitate and regulate the orderly disposal of surplus property while giving effect to 20 enumerated purposes, among which were (f) the giving of an opportunity to returning veterans to estab- [fol. 22] lish themselves in business, agriculture or professional life and (h) the discouragement of disposal of surplus property to speculators.

We think the government was damaged in several respects and in a manner difficult to assess in monetary damages. The government wished to sell its surplus motor vehicles to certified veterans in order to assist in their reassimilation into civil life, and it was natural that the prices and conditions under which the government was willing to make these sales to veterans was more favorable than in the market place where gray and black market conditions were not uncommon. Defendant's fraud caused the government to deal with a class to which it did not desire to sell its surplus motor vehicles. Further, by its conduct if there were any vehicles left after supplying the wants of service men, various agencies of the Federal Government had next priority. If the supply was exhausted by frauds such as perpetrated by the defendant there was no other place for Government Agencies to purchase needed vehicles except on the open market.

It is well settled that in addition to actual losses the government is entitled to reimbursement of costs in connection with ferreting out and investigation of the frauds. *Helvering* v. *Mitchell*, *supra*, p. 401; *Stockwell* v. *United States*, 13 Wall. 531, 547.

We hold that § 26(a)(1) is not penal in nature and that the judgment entered in favor of the government must be and is

Affirmed.

[fols. 23-24] IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11139

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

REX TRAILER COMPANY, INC., Defendant-Appellant

JUDGMENT—January 18, 1955

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

[fols. 25-26] [Clerk's Certificate to foregoing transcript omitted in printing.]